85-685

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IN RE AIR CRASH DISASTER AT MANNHEIM,
GERMANY ON SEPTEMBER 12, 1982

MDL-555

URSULA SCHOENBORN,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the courts endow an independent contractor with the government's sovereign immunity so as to immunize the contractor from its own negligence, without authorization from Congress?

2. Is the principle of separation of powers applicable, when a jury finds that a helicopter, accepted for use by the military, has been negligently designed, but the United States is not a party to the litigation and has no interest in its outcome?

3. Did the Third Circuit fail to apply the elements of the "government contractor defense" which it adopted, and usurp the function of the jury, when it ruled that the issue of relative knowledge of the Army and Boeing concerning the danger to the synch shaft of pinion displacement was "irrelevant"?

4. Is the manufacturer of a product used by the military immune from liability to military personnel and non-military claimants for negligent design of the product merely because the government accepted or approved the manufacturer's negligent design?

5. Did the Third Circuit fail to follow all of the law of Pennsylvania in applying the government contractor defense in favor of defendant?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rules 15.1(b) and 28.1, Counsel for Petitioner certifies that the parties to this proceeding are:

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Appeals Court (P. App. A) is reported at 769 F.2d 115 (3d Cir. 1985). The opinion of the District Court (P. App. B.) is reported at 586 F.Supp. 711 (E.D. Pa. 1984).*

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* Any reference to "P. App." refers to the Appendix filed by Petitioner Schoenborn.

JURISDICTION

The Third Circuit entered judgment in this matter on June 28, 1985. P. App. C. A petition for rehearing and suggestion of hearing en banc was denied on July 24, 1985. P. App. D. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions involved.

STATEMENT OF THE CASE

The instant case arises out of the crash of a U.S. Army CH-47C "Chinook" helicopter on September 11, 1982 at Mannheim, West Germany, killing the 46 occupants. Numerous actions were brought by families of the deceased occupants which included eight (8) American servicemen, and 38 British, French and West German civilian parachutists for wrongful death and survival in the Eastern District of Pennsylvania against the Boeing Company, Boeing-Vertol Division, which were consolidated for the purpose of trial on the issue of liability. *In re Air Crash at Mannheim, Germany on September 12, 1982,* 769 F.2d 115 (3d Cir. 1985).

The crash occurred when a bearing in the pinion package of the forward transmission of helicopter S/N 22292 failed and displaced the pinion shaft, which is connected to the No. 1 section of the synchronizing (synch) shaft through a coupling and an adapter. When the pinion shaft became displaced, it caused the synch shaft, considered a critical part, to come into contact with fuselage structure at Station 120 causing separation of the synch shaft, and resulting in desyn-

chronization, blade to blade contact and the catastrophe which followed. The clearance between the synch shaft and the fuselage structure was only 3/8 of an inch.

The CH-47C, a tandem rotor helicopter was designed and manufactured by the Boeing-Vertol Division of The Boeing Company at its plant outside Philadelphia. Plaintiffs based their claims on theories of negligence, strict liability, and breach of warranty for defective design, defective product and failure to warn.

The Court also ruled that under its diversity jurisdiction, it would apply the law of Pennsylvania to the issues of liability and damages as to all parties. *In re Air Crash at Mannheim, West Germany on September 11, 1982,* 575 F. Supp. 521 (E.D. Pa. 1983).

After a two week trial to a jury, the Court submitted the case on special interrogatories which found for the plaintiffs as follows: (P. App. E)

1. Was the defendant Boeing-Vertol negligent?

YES.

2. Was the negligence of Boeing-Vertol a proximate cause of the accident?

YES.

3. Was the Government's maintenance a superseding cause of the accident?

No.

4. Did the defendant Boeing-Vertol have final control of the design of the aircraft?

YES.

5. Was the aircraft when delivered by defendant to the Army defective?

YES.

6. Was the defect a proximate cause of the accident?

YES.

On this basis the District Court entered judgment on liability in favor of the plaintiffs. Boeing's motions for judgment notwithstanding the verdict or for a new trial, were denied. *In re Air Crash at Mannheim, Germany on September 11, 1982,* 586 F.Supp. 711 (E.D. Pa. 1984). The Court certified the issues, and the Third Circuit thereafter granted Boeing's petition for leave to appeal.

REASONS FOR GRANTING THE WRIT

The issues and questions arising out of this litigation present important questions of federal law affecting this and other pending litigation in district and circuit courts of appeal throughout the country, on which this Court has never ruled directly and which require settlement. *Keifer & Keifer* v. *Reconstruction Finance Corporation,* 306 U.S. 381, 387 (1939).

This litigation was before the District Court in Pennsylvania under its diversity jurisdiction, and the District Court, under Pennsylvana's choice of law rules, applied Pennsylvania law to the parties. The Third Circuit applied a form of federal decisional law recently articulated in federal courts in connection with product liability litigation against government contractors. See e.g. *In re Agent Orange Product Liability Litigation,* 534 F. Supp. 1046, 1054-1055 (E.D. N.Y. 1982); *McKay* v. *Rockwell International Corp.,* 704 F.2d 444, 451 (9th Cir. 1983) *cert. denied,* —— U.S. ——, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984).

The adoption and interpretation of these principles by the Third Circuit would eliminate completely the claims of hundreds of service personnel against military contractors for defective design of a product, merely because the government accepted the contractor's design and regardless of its defective condition. Such a result would also give to military contractors and their insurers, a windfall not intended by any military procurement contract. Further, allowing this defense to preclude a recovery in this and other cases, would perpetuate any defect in the design of a product sold to the military, to the detriment of our service personnel.

The adoption of this defense based on a concept of shared immunity, permits the courts to endow an independent contractor with a portion of the government's immunity, without authorization from Congress though the contractor may be negligent or provides a defective product. Such a result is contrary to decisions of this court.

In addition, the Third Circuit's application of this defense, based on the "separation of powers" principle, to claimants who are not barred fom suing the United States under the doctrine set out in *Feres* v. *United States,* 340 U.S. 135 (1950), and when the United States is not a party to the litigation, is contrary to the decisions of this court, and would preclude recovery by civilians even when the accident is caused by the contractor's negligence in designing the helicopter, which results in injuring or killing innocent persons on the ground and destroying property.

I.

The issue before the court is whether, based on a concept of shared immunity with the United States, there is a government contractor defense, which permits an independent contractor to escape liability for negligent design of a product sold to the military merely because the government accepts it in its defective condition.

This defense is basically described as having three elements, which defendant must prove: (1) establishment of product specifications by the government, (2) manufacture in accordance with those specifications, and (3) government knowledge of hazards at least equal to that of the manufacturer, *In re Agent Orange Liability Litigation,* 534 F. Supp. 1046, 1054-1055 (E.D.N.Y. 1982) and is applied when it appears that the United States is immune from suit. *McKay* v. *Rockwell International Corp.,* 704 F.2d 444, 448-449 (9th Cir. 1983).

The government contractor defense has been wrongly premised on this Court's decision in *Yearsley* v. *W. A. Ross Construction Co.,* 309 U.S. 18 (1940). *See, McKay* v. *Rockwell International Corp.,* 704 F.2d 444, 448 (9th Cir. 1983); *Tillet* v. *J. I. Case Co.,* 756 F.2d 591, 596 (7th Cir. 1985). In *Yearsley,* plaintiff argued that the work contracted for caused a part of petitioners land to be washed away, resulting in a taking of their land without just compensation in violation of the Fifth Amendment. 309 U.S. at 19-20. This Court held that there could be no liability unless the contractor exceeded his authority or that authority was not validly conferred. 309 U.S. at 20-21. However, *Yearsley* did not involve a claim of negligence or any other common law tort.

In other decisions this Court has held differently. In *Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation,* 258 U.S. 549 (1922) the petitioner alleged, *inter alia,* that the Fleet Corporation had unlawfully taken possession of property and retained it. The Court recognized that the United States could not be sued, but "even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general, the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name." 258 U.S. at 567-568.

In *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949), the suit was against the Administrator of the War Assets Administration, an agency of the United States, seeking an Order that the Administrator adhere to a contract for the sale of coal, and not sell or deliver it to any other party. The Court found that this action was a suit against the sovereign, which was not a party to the action, and reversing the Court of Appeals, upheld dismissal by the district court. The court explained that, based on the acts of the government's agent, "If those actions are such as to create a personal liability, whether sounding in tort or contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him. *Sloan Shipyards* v. *U.S. Fleet Corp.,* 258 U.S. 549, 567 (1922)." 337 U.S. at 686. Likewise, the court pointed out, that to determine if the government's agent can be held liable, it must be considered whether the judgment sought will require action by the sovereign or disturb the sovereign's property. 337 U.S. 686-692.

In *Keifer & Keifer* v. *Reconstruction Finance Corporation,* 306 U.S. 381 (1939), this court considered whether a Regional Agricultural Credit Corporation, chartered by the R.F.C., itself a creature of Congress, was immune from suit. The plaintiffs claimed that the Regional was negligent in providing proper care for livestock delivered to its care with resulting damage to the livestock. Both the R.F.C. and the Regional were sued. Mr. Justice Frankfurter, writing for the court, wrote:

> "* * * the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. *United States* v. *Lee,* 106 U.S. 196, 213, 221; *Sloan Shipyards* v. *U.S. Fleet Corp.,* 258 U.S. 549, 567.

306 U.S. at 388-389.

The concept of allowing an independent contractor to share the government's immunity is not supported by any act of Congress. It has long been the rule that the United States is immune from suit except as it consents to be sued. *Honda* v. *Clark,* 386 U.S. 484 (1967); a waiver of immunity must be specifically waived by an act of Congress. *Hopkins* v. *United States,* 513 F.2d 1360 (Ct. Cl. 1975) affirmed in part, vacated in part, 427 U.S. 123, 128 (1976). Only Congress has the power to define the limits and conditions of a waiver of immunity. *International Engineering Co., Division of A-T-O Inc.* v. *Richardson,* 512 F.2d 573, 167 U.S. App. D.C. 396 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 1048 (1976); *Crown Coat Front Co.* v. *U.S.,* 386 U.S. 503, 520 (1967).

If the waiver of sovereign immunity depends on an act of Congress, a court is without authority to endow an independent, private contractor with any portion of the government's immunity against a legitimate claim of negligence by a government employee. There has not been any Congressional authorization to the courts permitting the courts to cloak a military contractor with the government's immunity. *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 567-568 *rehearing denied,* 371 U.S. 854 (1962).

By applying the so-called "government contractor defense," the courts have created a private barrier to liability in favor of an independent contractor, based on endowing or cloaking the contractor with the immunity of the United States without any authority from Congress.

There is no basis for an independent contractor to be accorded any portion of the government's immunity since a judgment against an independent contractor such as Boeing does not operate as a judgment against the United States. *See, Pennhurst State School & Hospital* v. *Halderman,* —— U.S. ——, 104 S.Ct. 900, 79 L.Ed.2d 67, 78-79 (1984); *Stafford* v. *Briggs,* 444 U.S. 527, 542 n.10 (1980); *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 686 (1949).

Independent military contractors who sought to share in the government's immunity have been denied that right even though an indemnity agreement existed. *Foster* v. *Day & Zimmerman, Inc.,* 502 F.2d 867 (8th Cir. 1974); *Whitaker* v. *Harvell-Kilgore Corporation,* 418 F.2d 1010 (5th Cir. 1969). Similarly, in *United States* v. *Pennsylvania Environmental Hearing Board,* 431 F. Supp. 747 (M.D. Pa. 1977), the Board sought

to impose penalties on a government contracting officer and Chamberlain Manufacturing Company, an independent contractor, managing certain government-owned ammunition plants, for violating Pennsylvania's anti-water pollution statutes. The court distinguished between the government, which was shielded from regulation by the states unless there was a clear mandate from Congress which unambiguously authorized such regulation, 431 F. Supp. at 753; but, finding that Chamberlain was "an independent contractor and not an agency of the government" the court let the penalty against the independent contractor stand. 431 F. Supp. at 754-755. *See also Powell* v. *United States,* 339 U.S. 497, 505-507 (1950).

Some courts justify the sharing of the government's immunity on principles of fairness. *See Bynum* v. *FMC Corporation,* 770 F.2d 556, 566 (5th Cir., 1985). Fairness to whom? Under the government contractor defense, is it fair that a contractor which gets millions of dollars from the government should be *fully* immune from responsibility when its negligently designed product kills or injures a serviceman, because, the serviceman is "at least, partially compensated." *Id.* at 566.

The contractor already had a windfall under a Standard Armed Service Procurement Regulation which limited liability of a contractor for loss or damage to the product occurring after delivery to the government "resulting from defects or deficiencies in such supplies." 32 CFR 7-104:45.

Another excuse used by the courts is that contractor liability will result in increases in insurance premiums which will be passed on as a cost to the government.

Id. at 566. Boeing had already been reimbursed by the government for the cost of insurance premiums at the time of trial. Immunizing the contractor results in a windfall to the insurance company, as well as the contractor, since the insurer gets the premium but has no risk, and the serviceman and others for whose benefit the insurance was acquired and paid for by the government, gets nothing. Fairness indeed!

In this litigation the contract itself established that Boeing was undertaking the contract "as an independent contractor and not as an agent or employee of the government * * *." In this case also, there was no evidence of an indemnity agreement, thus no indication that a judgment against Boeing would operate as a judgment against the United States, or affect the assets or other property of the United States.

There is a substantial conflict in the application of decisions of this Court as to when an independent contractor is entitled to be sheltered from suit even though found to be negligent, merely because he is attempting to fulfill a government contract.

The anomaly exists, based on the decisions of this Court, that although it takes an act of Congress to bestow governmental immunity on a government corporation, the courts are giving it away to private contractors to the detriment of service personnel who are innocent victims of contractor negligence.

II.

In reversing the district court, the Third Circuit did not specifically address the claims involving nonmilitary personnel. Instead, these claims were dis-

missed with the curt statement that "the separation of powers principle that bars judicial second guessing of military judgments applies regardless of the status of the plaintiffs * * *." 769 F.2d at 121.

This result is contrary to this court's decision in *Feres* v. *United States,* 340 U.S. 135 (1950); *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666 (1977) and its most recent decision in *United States* v. *Shearer,* 473 U.S. ——, 87 L.Ed.2d 38, 105 S.Ct. —— (1985) and conflicts with the premise that the rationale for the existence of a government contractor defense is bottomed on the immunity of the government under *Feres/Stencel. McKay* v. *Rockwell International Corp.,* 704 F.2d 444, 448-451 (9th Cir. 1983).

The *Feres* case and its progeny have never been applied to non-military personnel. The rationale for *Feres* has always been based on the question of military discipline. The British, French and German parachutists were non-U.S. military personnel, not subject to U.S. military discipline and, therefore, cannot be governed by the *Feres* doctrine. *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. at 669. Nor does *Feres* bar independent actions by dependents of servicemen. See e.g. *In Re Agent Orange Litigation,* 580 F. Supp. 1242 (E.D. N.Y. 1984), *appeal dismissed,* 745 F.2d 161 (2d Cir. 1984).

The Third Circuit's conclusion that the status of the plaintiff is immaterial also conflicts with its own decisions. *Heilman* v. *United States,* 731 F.2d 1104, 1106-1107 (3d Cir. 1984); *Hinkie* v. *United States,* 715 F.2d 96, 98 (3d Cir. 1983), *cert. denied* 104 S.Ct. 1276 (where injury to civilian derived through injury to

serviceman); *Sheppard* v. *United States,* 369 F.2d 272 (3d Cir. 1966), *cert. denied,* 386 U.S. 982 (1967); [See also *Lee* v. *United States,* 400 F.2d 185 (9th Cir. 1968), *cert. denied,* 393 U.S. 1053 (1969), arising out of same accident as *Sheppard*]. It is clear that the status of a claimant governs whether the *Feres* doctrine is applicable. Mr. Justice Marshall, in his dissent in *Stencel,* also recognized that the difference in status of the injured party has an effect on liability. *Stencel Aero Engineering* v. *United States,* 431 U.S. at 676.

In *United States* v. *Shearer, supra,* this court ruled that the mother of an Army serviceman could not bring an action against the Government under the Federal Tort Claims Act for the death of her son who was kidnapped and murdered by another serviceman, since the death occurred as a result of an assault and battery, a tort for which the United States may not be sued. 28 U.S.C. 2680(h). 431 U.S. ——, 87 L.Ed.2d at 42-44. In discussing the potential application of *Feres,* this court concluded that a suit against the United States would not stand since the suit could require the civilian court to second guess military decisions, involving the " 'management' of the military." 87 L.Ed. 2d at 44.

This approach is consistent with the decision in *Stencel* barring the suit for indemnity against the government, because the trial would " * * * involve second guessing military orders and would often require members of the Armed Services to testify in court as to each others decisions and actions.

However, unlike either *Shearer* or *Stencel,* the United States is not being sued in this litigation, is not a party to the actions, and any judgment against

Boeing for its negligence would not operate as a judgment against the government or its property.[1]

Beyond its bare pronouncement, the Third Circuit failed to explain how the separation of powers principle is violated when a jury is asked to evaluate a military contractor's negligence, not the government's, and the government is not a party to the action. The decisions of the military are not being questioned; what is in issue is the action of the manufacturer in providing a defectively designed helicopter and in failing to follow the standards of a prudent manufacturer, by not conducting a failure mode analysis and by failing to warn the customer of all the hazards and dangers in the use of its product, or which are inherent in its design.

The trial did not involve the second guessing of military orders or decisions; no members of the military testified as to each other's decisions and actions. Military discipline is not involved. The government was not a party to the action and no government witness was called by Boeing to explain any of its decisions or underlying considerations in the purchase of the helicopter. *Stencel,* 431 U.S. at 673.

If there is any second guessing, in this case, it was by the Circuit Court, when it tried to explain why it concluded that the issue of relative knowledge was irrelevant, contrary to the elements of the government contractor defense it had just adopted. 769 F.2d at 124-125. (See *infra,* pp. 18-20).

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[1] The Shearer case has already been misapplied in a government contractor case. See *Bynum* v. *F.M.C. Corp.*, 770 F.2d 556, 561-563 (5th Cir. 1985).

The circuit court failed to cite any authority or rule supporting the application of the separation of powers principle in this negligence case where the government was not a party and where the issue was whether the manufacturer had met the standards of a prudent manufacturer in Pennsylvania, *Brown* v. *Caterpillar Tractor Co.*, 741 F.2d 656, 659-669 (3d Cir. 1984) a case in which, notwithstanding the similarity of the underlying facts, the Court found no basis for application of the separation of powers principle. Likewise, there is none here, whether the plaintiff is military or non-military.

The separation of powers principle has no application in this "government contractor" case, purportedly based on the *Feres/Stencel* doctrine; it distorts the *Feres* doctrine to imply that the separation of powers principle that bars judicial second-guessing of military judgments applies, regardless of the status of the plaintiffs, when the government is not a party to the action.

III.

Today's "government contractor defense" was set forth in the case of *In Re Agent Orange Product Liability Litigation*, 534 F. Supp. 1046, 1055 (E.D. N.Y. 1982) as follows:

> * * * a defendant * * * will be entitled to judgment dismissing all claims against it based on that defendant's having supplied "Agent Orange" to the government pursuant to a contract, if the defendant proves:
>
> 1. That the Government established the specifications for "Agent Orange";

2. That the "Agent Orange" manufactured by the defendant met the government's specifications in all material respects; and

3. That the government knew as much as or more than the defendant about the hazards to people that accompanied use of "Agent Orange."

In *Brown* v. *Caterpillar Tractor Co.* (Brown I), 696 F.2d 246 (3rd Cir. 1982), the Third Circuit found that Pennsylvania recognizes the "government contractor defense," which was based on two highway construction cases, i.e., *Ference* v. *Booth & Flynn Co.*, 370 Pa. 400, 88 A.2d 413 (1952) and *Valley Forge Gardens* v. *James D. Morrissey, Inc.*, 385 Pa. 477, 123 A.2d 888 (1956). In each case, the state placed a contract to build highways out for bid and supplied the complete specification of the work to be done, which was the work product of the State Highway Commission. Under these circumstances, the successful bidder agreed to follow those plans and specifications for constructing the highway. But neither of these cases dealt with the issue present in this case, i.e., whether the defense is applicable, and under what circumstances, when the plans and specifications originate with the contractor.

Here, the plaintiffs showed that Boeing originated and prepared the detail design, designed the clearance at Station 120, but did not do any failure analysis to determine what effect forward pinion shaft displacement due to bearing failure would have on the No. 1 synch shaft. Boeing claimed it retained all proprietary rights to the design and drawings.

Since the design and detail specifications for the helicopter were prepared by Boeing, and not the gov-

ernment, Boeing cannot claim it was merely doing the government's will. And even if Boeing was merely doing the government's will when it designed the helicopter, it was required to do so in a non-negligent fashion. *Valley Forge Gardens,* 385 Pa. at 483-484, 123 A.2d at 891; *Brown I,* 696 F.2d at 250.

In *Brown I,* the Third Circuit found the approach in "Agent Orange" to be both "attractive" and "novel," but did not apply it. 696 F.2d at 254, n. 17.

In *McKay* v. *Rockwell International Corporation,* 704 F.2d 444 (9th Cir. 1983) Alarcorn, J. dissenting, the Court ruled out contractor liability under the principles of strict liability enunciated in section 402A, Restatement of Torts, but not manufacturing defects, and modified the "Agent Orange" elements. 704 F.2d at 451.

The *McKay* Court bottomed its rationale on this Court's dual decisions in *Feres* v. *United States,* 340 U.S. 135 (1950) and *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666 (1977) which together hold that under the Federal Tort Claims Act, a serviceman may not recover for injuries sustained incident to service as a result of government negligence; thus a third party is precluded from recovering indemnity from the government for the damages it pays to a serviceman since it would require the government to do indirectly what it is forbidden to do directly. *McKay* v. *Rockwell International Corporation,* 704 F.2d at 448.

The *McKay* court modified the Agent Orange principles by making the government's immunity under *Feres/Stencel* the first condition of the defense, and then required a showing that the government estab-

lished the specifications, "or approved, reasonably precise specifications for the allegedly defective military equipment" and that the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment which were known to the supplier but not to the United States. 704 F.2d at 451.

The Third Circuit had an opportunity to consider the *Agent Orange/McKay* doctrine in its second decision in *Brown* v. *Caterpillar Tractor Company (Brown II)*, 741 F.2d 656 (3rd Cir. 1984) but did not. However, in *Koutsoubos* v. *Boeing Vertol*, 755 F.2d 352 (3rd Cir. 1985), the Third Circuit applied *Agent Orange* principles as federal common law, since it was an admiralty case (*Id.* p. 354), holding that the government's approval of specifications, developed through negotiations between the contractor and the military, satisfied the first prong of the *Agent Orange* defense, even though the majority of specifications originated with the contractor. *Id.* p. 355.

Assuming there is a "government contractor defense and it consists of the elements enunciated in Agent Orange/McKay, the Third Circuit failed to follow the rule it adopted.

One of the key elements of the alleged defense, which the defendant must prove, is that the government knew as much as or more than the defendant about the hazards to people that accompanied the use of the product or that the supplier warned the government about the errors in its specifications known to the supplier. *Agent Orange*, 534 F.Supp. at 1055; *McKay*, 704 F.2d at 451.

This element enables the United States to balance risks and benefits inherent in its use. *McKay,* 704 F.2d at 451; or to decide whether and how to use the product. *Agent Orange,* 534 F. Supp. at 1057-1058.

Boeing had a duty to advise the military of known risks attendant to the helicopter which it supplied, and for its failure to do so, Boeing should not be insulated from liability for damages which would never have occurred if the Army had been apprised of the hazards known to Boeing.

The evidence was overwhelming that after investigating a prior accident, Boeing had never communicated to the Army information concerning the effect of pinion shaft bending on the synch shaft that "when the pinion bends two degrees, the synch shaft rubs hard on structure. This rub (hard) precipitates the immediate and ultimate failure * * *." P. App. F. Boeing, which had the burden of proof, produced no letters, memos, reports or other documents indicating this information was transmitted to the Army and also failed to produce any documents indicating it ever recommended that the Army consider increasing the clearance between the synch shaft and structure, to avoid the rubbing which "precipitates the immediate and ultimate failure * * *."

By deciding that the issue of knowledge was "irrelevant," 769 F.2d at 124, the Third Circuit usurped the function and finding of the jury, thus substituting its own evaluation of the evidence in place of the jury's findings.

Without reference to any portion of the record to indicate the extent or quality of the Army's knowledge, the Third Circuit concluded that the Army had knowl-

edge that the forward transmissions in use on the CH-47C had a dangerous propensity towards bearing failure, yet the Army adhered to the original design specifications. 769 F.2d at 124. Determining the extent and quality of the knowledge was a jury function.

The overwhelming evidence of Boeing's failure to meet its duty to warn of the danger to the synch shaft, *McKay,* 704 F.2d at 451, easily explains the Army's adherence to the original design specifications. This failure to warn was an issue for the jury to evaluate, and determine if such knowledge as the Army had was equal to or greater than that of Boeing's.

By characterizing the issue of knowledge and Boeing's duty to warn, as "irrelevant," and by ignoring the jury's findings, as well as the evidence, the Third Circuit undermined the rule it adopted in *Koutsoubos* v. *Boeing Vertol Div.,* 755 F.2d at 354-355, and failed to adhere to its own standard of review that the jury's verdict should be upheld if the record contained the minimum quantum of evidence, from which the jury could have rationally reached the verdict. *Black* v. *Stephens,* 662 F.2d 181, 187 (3d Cir. 1981), *cert. denied,* 455 U.S. 1008 (1981), *reh. denied,* 456 U.S. 950 (1981); *Hahn* v. *Atlantic Richfield Co.,* 625 F.2d 1095, 1099 (3d Cir. 1980).

IV.

If it is assumed there is a valid basis for a "government contractor defense," which would insulate an independent contractor such as Boeing from the consequences of its own negligent design of a product, and its failure to warn of hazards, the rule adopted by the Third Circuit is inadequate and incomplete.

In *Agent Orange,* the court wrote as follows:

> Courts should not require suppliers of ordnance to question the military's needs or specifications of weapons *during wartime.* Whether to use a particular weapon that creates a risk to third parties, whether the risk could be avoided at additional cost, whether the weapon could be made safer if a longer manufacturing time were allowed, indeed, whether the weapon involves any risk at all, are all proper concerns of the military which selects, buys and uses the weapon * * * (emphasis added)

534 F. Supp. at 1054.

The contract which included manufacture of S/N 22292 was let in June, 1974 at a time when the United States involvement in the Viet Nam hostilities was officially over. Delivery of the first helicopter was due in December, 1974 and was to be spread out over a period of thirteen months until December, 1975. The design defect was contained in the original design drawings.

Testimony by Boeing's contract manager conceded the independent character of Boeing as a contractor and admitted that Boeing was under no compulsion to accept the contract. Boeing's acceptance of the contract was merely the act of an entrepreneurial entity, manufacturing a helicopter which Boeing had defectively designed for profitable sale.

To take advantage of a so-called "government contractor defense" the independent contractor should be required to make a showing of compulsion, beyond the obligations assumed under the contract. For the government contractor defense to be effective, there is a requirement that the government "compel," "direct"

or "design" the construction, manufacturing or other activity at issue, e.g. *Merritt, Chapman & Scott Corp.* v. *Guy F. Atkinson Co.*, 295 F.2d 14, 16 (9th Cir. 1961) (compulsion a necessary element of the government contractor defense); *Johnson* v. *United States*, 568 F. Supp. 351, 356 (D. Kan. 1983) (government contract defense applies only where injury-causing aspect of the product mandated by the contract); *In Re Agent Orange Product Liability Litigation*, 534 F. Supp. 1045, 1055 (E.D. N.Y. 1982) (government contract defense applies when the government establishes specifications and the contractor meets those specifications in all respects).

The Ninth Circuit ignored the element of "compulsion" in *McKay*, though its previous holding in *Merritt, supra*, and "all the cases relied upon by the *McKay* majority, which apply the [government contractor] defense, found some factor which compelled the contractor to act as they did." *McKay, supra*, 704 F.2d at 458 (Alarcon, J., dissenting). Although the Ninth Circuit's new *McKay* standard only required the military to establish or *approve* reasonably precise specifications for the allegedly defective military equipment, *Id.* at 451 (emphasis added), the *McKay* majority avoided expressly announcing the demise of *Merritt* and the compulsion requirement.

Although the Third Circuit in *Koutsoubos* v. *Boeing Vertol*, 755 F.2d 352 (3rd Cir. 1985), was concerned that without proof of compulsion, there would be no justification for the defense, it found this concern satisfied by a "continuous back-and-forth" with the company, concluding the Navy exercised final authority over the specifications. *Id.* at 355. The fundamental

change wrought by *McKay*, that the government need not compel or establish design, but merely approve it, is not altered. The final authority over the specifications mentioned above in *Koutsoubos* is only the ability to approve or reject the contractor's specifications or design, but does not meet the test of compulsion.

This departure from the traditional government contractor defense requiring that compulsion be shown, if universally applied, will eliminate all civil liability in tort of military contractors to military personnel during peacetime as well as wartime. An independent contractor, such as Boeing, should not be allowed to escape liability for its negligent design when the defective design was not compelled by the military and there is no showing that the design served any unique military purpose.

Without a showing of compulsion, there is no justification for barring negligence suits whenever the military approves a contractor's design and the application of the government contractor defense, without such a showing, unjustly defeats such claims.

V.

Since the helicopter was manufactured in Pennsylvania, the Third Circuit undertook to apply Pennsylvania law based on its prior holdings in *Brown* v. *Caterpillar Tractor Co.*, 741 F.2d 656 (3d Cir. 1984) [*Brown II*], and *Brown* v. *Caterpillar Tractor Co.*, 696 F.2d 246 (3d Cir. 1982) [*Brown I*].

With the decision in *Bynum* v. *FMC Corporation*, 770 F.2d 556 (5th Cir., 1985) a conflict has developed as to whether state law is applicable as posited by the

Third Circuit in this case, or whether "federal common law" is applicable. *Bynum,* 770 F.2d 567-578.

However, if the Third Circuit was correct to apply Pennsylvania law the Circuit Court failed to apply fully all of the applicable law. In *Brown* v. *Caterpillar Tractor Co.,* 741 F.2d 656 (3d Cir. 1984) [*Brown II*], after plaintiff's appeal from a defense verdict, the circuit reaffirmed the applicability of the principles of Section 402A [Restatement of Law (Torts) II]. Specifically the Court ruled it was error to instruct the jury that if they found the Army knew of the danger of operating the bulldozer without the appropriate protective device, then Caterpillar was not liable for plaintiff's injury. 741 F.2d at 659-661.

The court explained that Pennsylvania's concern is that manufactured products be free from defects as of the time of manufacture, regardless of whose hands they subsequently fall into, and the responsibility of the manufacturer runs to the ultimate consumer in accordance with Pennsylvania struct liability policy of risk spreading, pointing out that "the risk remains with the manufacturer unless actually assumed by the user." 741 F.2d at 660.

Boeing's failure to adivse the Army, its pilots and mechanics, of the relationship between pinion shaft displacement and synch shaft displacement, with its potentially disastrous consequences, rendered the CH-47C defective under Pennsylvania law. The facts in this case do not even reach the level of proof in *Brown II,* where evidence showed that notice had been given to the Army, and the Circuit Court remanded to see if the information Caterpillar gave to the Army was sufficiently effective. 741 F.2d at 661.

In *Brown II,* the Circuit Court stated, somewhat simplistically, that "the issue in a design defect case is whether the design of the product is or is not that called for by the specifications." 741 F.2d at 662.

But the evidence was clear that there was no government performance specification which mandated or even referred to the size of the clearance between the synch shaft and the fuselage structure at Station 120; the final detail specification made no reference to the clearance. The clearance could only be determined by reference to certain drawings.

Defectiveness is solely a function of the condition in which the product is delivered to the consumer. *Hammond* v. *International Harvester Co.,* 691 F.2d 646, 652 (3d Cir. 1982). Certainly, the clearance was an "objectively definable condition inherent in the product itself * * *" *Id.* at 650, which had been carried over from the original design to the manufacture of helicopter 22292. The government's mission requirements, to which Boeing designed the CH-47, did not call for Boeing to build a defectively designed helicopter. *Foster* v. *Day and Zimmerman, Inc.,* 502 F.2d 867, 874, n. 5 (8th Cir. 1974).

Thus, the Circuit Court, under Pennsylvania law, should have applied the law of the Brown case with equal vigor and let stand the jury's verdict that helicopter 22292 was defective because the clearance between the No. 1 shaft and Station 120 was inadequate.

CONCLUSION

For the reason set forth, it is respectfully submitted that this Petition for Certiorari be granted.

Respectfully submitted,

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